Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1798 OF 2011
ABU SAMAH, AZIAH ALI AND MOHAMAD ARIFF JJCA
11 OCTOBER 2013

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Civil Procedure — Pleadings — Issue not pleaded — Whether trial judge breached audi alteram partem rule — Whether opposing party denied right of rebuttal when judge on own accord gave judgment for unpleaded quantum meruit claim — Whether claim for quantum meruit cause of action in itself requiring express pleading and adduction of evidence in support — Whether omnibus prayer in statement of claim for 'further or other relief' could not be used to decide upon matters not pleaded

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In an attempt to do justice to the respondent, the High Court when dismissing its claims for special and general damages on the ground they were not proved, ordered the registrar to assess damages payable by the appellant to the respondent on a quantum meruit basis even though such a claim had not been pleaded. The parties were asked by the trial judge to submit on the issue of quantum meruit based on the 'omnibus' prayer in the statement of claim asking for 'further or other relief as the court deemed fit and proper' after the parties had closed their respective cases. As such, no evidence on a claim for quantum meruit was led during the trial nor was there any evidence whether or not the parties had intended that there should be an implied term in their agreement that the respondent would be reimbursed for all costs and expenses it had incurred in the submission of a tender for the benefit of the appellant. The court not only held that such a term could be implied, it also held that even if a quantum meruit claim and implied term was not available, it could order the respondent to be compensated under s 71 of the Contracts Act 1950 ('the Act'). Just like the claim for quantum meruit, neither the matter of the implied term nor s 71 of the Act was pleaded. Under the cooperation Agreement between the parties the respondent carried out substantial work to help ensure the appellant secured the award for a project. During that pre-award stage, the agreement provided that each party was to bear its own costs. Once it had secured the award the appellant was to appoint the respondent as process designer upon terms and conditions to be agreed upon. The only issue in the instant appeal was whether the High Court was correct to have ordered damages on quantum meruit basis.

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Held, allowing the appeal with costs of RM10,000:

(1) In deciding on his own accord to order damages to be assessed on

quantum meruit basis for the sake of justice and fairness, the trial judge had downplayed the maxim 'audi alteram partem'. To decide on an unpleaded claim was to deny the opposing party the valuable right to answer the claim. The problem in the instant case was compounded by the absence of material facts to support a quantum meruit claim. The claim was never expressly pleaded and was never part of the agreed facts, agreed issues or summary of the plaintiff's case which was wholly grounded on a claim for special and general damages (see paras 21–22).

(2) The claim for quantum meruit was a cause of action in itself, which was substantive in nature and therefore required express pleading and the adduction at trial of a sufficient foundation of facts derived from evidence tendered through witness testimony or relevant, cogent documentary evidence. By the same token, it was difficult to blandly accept that the 'omnibus' prayer of 'further or other relief' could supply the omission of an express pleading. Resort to the omnibus prayer only made sense if the main claim was not dismissed, since, after all, the prayer was for 'further or other relief' (see para 27).

(3) There was no basis for s 71 of the Act to be applied especially in the face of clear provisions in the contract between the parties which made the respondent's appointment as process designer dependent on further agreement during the post-award stage. Section 71 could not be interpreted as providing a relief not intended by the parties (see para 28).

(4) With regard to the implied term, to accept it was to directly conflict with the clear terms of cl 10 of the contract (which required each party to bear its own costs and expenses). It was no function of the courts to improve the case for the parties. It was for the respondent to ensure by clear contractual provisions that its pre-award expenses and costs would be reimbursed or shared in whatever proportion it thought fair in the circumstances. It made a commercial decision to agree to cl 10 and cl 2.1 of the cooperation agreement and it had to stand by it based on the principle of freedom of contract (see para 29).

[Bahasa Malaysia summary

Sebagai langkah untuk mendapatkan keadilan bagi responden, Mahkamah Tinggi dalam menolak tuntutannya bagi ganti rugi am dan khas atas alasan bahawa kesemuanya tidak dibuktikan, memerintahkan pendaftar untuk menaksir ganti rugi yang perlu dibayar oleh perayu kepada responden berdasarkan quantum meruit walaupun tuntutan sedemikian tidak diplidkan. Pihak-pihak diminta oleh hakim bicara untuk berhujah mengenai isu quantum meruit berdasarkan permohonan 'Omnibus' dalam penyataan tuntutan memohon bagi 'relief lain atau lanjut yang difikirkan mahkamah wajar dan sesuai' selepas pihak-pihak menutup kes masing-masing. Dengan itu, tiada keterangan mengenai tuntutan quantum meruit yang dikemukakan

ketika perbicaraan mahupun keterangan sama ada atau tidak pihak-pihak meniatkan bahawa terdapatnya satu terma tersirat dalam perjanjian mereka bahawa responden akan dibayar ganti rugi bagi kos dan perbelanjaan yang ditanggungnya dalam penghujahan satu tender bagi manfaat perayu. Mahkamah bukan sahaja memutuskan bahawa terma sedemikian boleh disiratkan, malah memutuskan bahawa jika tidak terdapat tuntutan quantum meruit dan terma tersirat, mahkamah boleh memerintahkan responden untuk dipampas di bawah s 71 Akta Kontrak 1950 ('Akta'). Seperti tuntutan quantum meruit, kedua-dua hal perkara terma tersirat mahupun s 71 Akta tidak diplidkan. Di bawah perjanjian kerjasama antara pihak-pihak, responden menjalankan kerja-kerja substansial bagi memastikan perayu mendapat award bagi sebuah projek. Semasa peringkat pra-award, perjanjian memperuntukkan bahawa setiap pihak perlu menanggung kos masing-masing. Apabila ia telah mendapatkan award, perayu perlu melantik responden sebagai 'process designer' setelah terma dan syarat dipersetujui. Satu-satunya isu dalam rayuan ini adalah sama ada Mahkamah Tinggi bertindak betul dalam memerintahkan ganti rugi berdasarkan quantum meruit.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Dalam memutuskan pada hematnya untuk memerintahkan agar ganti rugi ditaksirkan berdasarkan quantum meruit bagi tujuan keadilan dan kesaksamaan, hakim bicara telah meremehkan maksim 'audi alteram partem'. Untuk memutuskan satu tuntutan yang tidak diplidkan adalah menafikan pihak yang menentang akan hak yang bernilai untuk membalas tuntutan tersebut. Masalah dalam kes ini diburukkan lagi dengan ketiadaan fakta-fakta material untuk menyokong tuntutan quantum meruit. Tuntutan tersebut tidak pernah diplidkan secara nyata dan tidak pernah membentuk sebahagian daripada fakta-fakta yang dipersetujui, isu-isu yang dipersetujui atau ringkasan kes plaintif yang mana keseluruhannya bersandarkan pada tuntutan bagi ganti rugi am dan khas (lihat perenggan 21–22).

(2) Tuntutan bagi quantum meruit adalah dengan sendirinya, satu kausa tindakan, yang mana bersifat substantif dan dengan itu, memerlukan pliding nyata dan pengemukaan asas fakta yang mencukupi ketika perbicaraan diperolehi daripada keterangan yang dikemukakan melalui keterangan saksi atau keterangan dokumentari yang relevan dan jelas. Begitu juga, adalah sukar untuk menerima bahawa permohonan 'omnibus' iaitu 'relief lanjut atau lain' boleh menyebabkan ketinggalan dalam pliding nyata. Membuat permohonan omnibus hanya lebih wajar sekiranya tuntutan utama tidak ditolak, kerana, permohonan adalah bagi 'relief lanjut atau lain' (lihat perenggan 27).

(3) Tiada asas untuk mengguna pakai s 71 Akta khasnya dalam keadaan peruntukan-peruntukan nyata dalam kontrak antara pihak-pihak yang

menjadikan pelantikan responden sebagai 'process designer' bergantung pada perjanjian lanjut ketika peringkat pra-award. Seksyen 71 tidak boleh ditafsirkan sebagai memperuntukkan relief yang tidak diniatkan oleh pihak-pihak (lihat perenggan 28).

(4) Berhubung terma nyata, untuk menerimanya adalah untuk mewujudkan konflik langsung dengan terma-terma jelas klausa 10 kontrak (yang memerlukan pihak-pihak menanggung kos dan perbelanjaan masing-masing). Bukanlah menjadi fungsi mahkamah untuk memperbaiki kes bagi pihak-pihak. Ia terpulang kepada responden untuk memastikan, melalui peruntukan kontraktual yang jelas bahawa perbelanjaan-perbelanjaan dan kos pra-award akan diganti semula atau dikongsi dalam apa jua pembahagian yang dianggap adil dalam hal keadaan. Ia membuat keputusan komersil untuk bersetuju dengan klausa 10 dan 2.1 perjanjian kerjasama dan ia perlu berpegang padanya berdasarkan prinsip kebebasan kontrak (lihat perenggan 29).]

Notes

For cases on issue not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6485–6494.

Cases referred to

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

KEP Mohamad Ali v KEP Mohamad Ismail [1981] 2 MLJ 10, FC (refd)

Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ (Rep) 190, FC (not folld)

Md Hamid Merican bin Abdul Kader Merican v Abdul Razak bin Hussain & Ors [2010] 9 MLJ 1, HC (refd)

National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam [2000] 2 MLJ 144, CA (refd)

Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293, FC (refd)

Quah Swee Khoon v Sime Darby Bhd [2000] 2 MLJ 600, CA (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

Legislation referred to

Contracts Act 1950 s 71

Appeal from: Civil Suit No D22–1170 of 2009 (High Court, Kuala Lumpur)

T Kasinathan @ Sunther (Nurashikin Mansoor with him) (Affendi Zahari) for the appellant.

Abu Bakar Jais (Abdullah Omar Wahbi Bawadi with him) (Hisham Sobri & Kadir) for the respondent.

Mohamad Ariff JCA:

INTRODUCTION

[1] This was an appeal by the defendant from the decision of the High Court after a full trial whereby the learned judicial commissioner dismissed the plaintiffs claim for special and general damages, but nonetheless ordered that damages be assessed by the registrar on a quantum meruit basis in what appeared to be an exercise of the court's discretion *'to do justice to the party that deserves it though the pleadings may be less than elegantly worded.'* (see pp 38 and 39 of the grounds of judgment).

THE DECISION OF THE HIGH COURT

[2] The claim for quantum meruit was not expressly pleaded and yet was ordered by the learned High Court, purportedly, as indicated above, to do justice between the parties. The learned judicial commissioner held:

> The plaintiff's contribution in such a situation as anticipated … where work had been done and costs incurred can be recognized and be claimed under quantum meruit … Learned counsel … was quick to object that such a relief cannot be granted because it was not pleaded. I need only say that one must go back to basics and it is this: the sole purpose of pleadings is so that no party would be taken by surprise. Here the defendant is not taken by surprise because all the relevant facts justifying a claim for general and special damages have been pleaded. The bigger includes the smaller. Whilst the Court may not grant any general and special damages, the Court may still proceed to grant the 'smaller' which is a claim on a quantum meruit basis. The words 'quantum meruit' need not have been used if the facts justifying it are writ large in the whole claim …
>
> We must not be so fixated to pleadings that we fail to see the wood for the trees … (pp 36–37 of the grounds of judgment)

[3] The appellant's counsel started his submission by informing the court that there was only one issue in this appeal, and that was whether the learned judicial commissioner was correct to have ordered damages on the quantum meruit basis. Counsel submitted the learned judicial commissioner erred in deciding on unpleaded issues. Aside from the quantum meruit issue in general, the learned judicial commissioner also accepted that the court could imply a term in the agreement that the parties must have intended the respondent was to be reimbursed for all its costs and expenses in the submission of the tender for the benefit of the appellant, and further that s 71 of the Contracts Act 1950 would apply. Both issues were also not expressly pleaded.

[4] The learned judicial commissioner in fact held:

> Even if a claim under quantum meruit and implied term is not available, this Court can also make compensation under s 71 of the Contracts Act 1950 …
>
> Here the plaintiff had done something lawful for the defendant and it did not intend it to be done gratuitously and needless to say the defendant had enjoyed the benefits of a RM163 million contract … (see p 40 of the grounds of judgment)

OUR DECISION

[5] We agreed with the submission of the appellant and allowed the appeal with costs of RM10,000 to be paid by the respondent to the appellant. We further ordered the deposit to be refunded back to appellant.

[6] We found the learned judicial commissioner had decided based on an unpleaded claim. Indeed, there had been an earlier oral application by the respondent to amend its claim at the close of the trial to fortify its claim for special damages but that was dismissed by the High Court, given the lateness in the application. The substantive claim was dismissed, but yet the High Court allowed a claim for quantum meruit.

[7] The High Court had decided to order an assessment of damages by the registrar based on an 'omnibus' prayer in the statement of claim, ie the claim for further and other relief, reflected in para 18(g) of the statement of claim, reading: 'Lain-lain perintah yang difikirkan wajar, sesuai dan manfaat oleh Mahkamah Yang Mulia ini.' This, in our judgment, was an error in the circumstances of this case.

[8] The learned judicial commissioner also held that compensation could also be payable under s 71 of the Contracts Act 1950, if the basis of quantum merit and implied terms was not available. As for incorporating implied terms, we also agreed with the appellant's submission that this too was not pleaded.

[9] The judicial commissioner, in the exercise of his discretion, had therefore misapplied fundamental rules of pleadings. The issue of quantum meruit was raised only after the full hearing of the witnesses ended, coming up only at the close of the trial when the learned judicial commissioner requested parties to raise it during submission.

[10] Thus, no evidence on the claim of quantum meruit was led, nor any evidence on the intention of the parties to support the inference of the implied term for reimbursement; the evidence led related to the respondent's claims for

special and general damages, which were in fact dismissed by the learned judge, and, as earlier indicated, the oral application to amend to fortify the claim for special damages was dismissed by the court.

THE BACKGROUND FACTS

[11] The respondent and the appellant had entered into a cooperation agreement dated 26 December 2006 whereby the respondent (and another party named as Trident Water Pty Ltd) would assist the appellant to tender for a project in Putrajaya described as the STP2 module two project. The aim was to ensure that the appellant would be awarded the project.

[12] According to the respondent, it had contributed substantially in this regard, having prepared the development proposal, drawings, plans, design, calculations, pricings, and specifications for the project. The respondent maintained the appellant had relied on these when bidding for the project which it ultimately secured. The learned judicial commissioner considered this and came to a conclusion that for the sake of justice and fairness it was proper to award damages based on a quantum meruit basis.

THE COOPERATION AGREEMENT

[13] The cooperation agreement contained the following pertinent provisions in cll 2.1 and 10:

> *Clause 2.1*
>
> The parties agree to collaborate on an exclusive basis and coordinate their efforts to assist PSPSK to secure the Award. When the Project is awarded to PSPK, PSPK will enter into further agreement(s) with JWSB and TW and to appoint JWSB/TW as the Process Designer for the Water and Wastewater Systems Facilities for the Project upon the terms and conditions therein contained.
>
> *Clause 10*
>
> Each party shall bear its own costs and expenses incurred in connection with the preparation and submission of pre-qualification documents and/or the submissions in respect of the Project and any subsequent negotiation up to the date of the execution of the agreement(s) referred to in cl 2.1.

[14] On the facts, no subsequent agreement was entered into. Instead, the appellant appointed other parties as the process designer for the project. The High Court in fact alluded to this, finding that the respondent had, after the grant of the award, made a 'commercial offer' to the appellant for the respondent to be appointed as the process designer, but the parties disagreed on pricing.

[15] It came out crystal clear in the judgment that parties were still negotiating to enter into a post-award agreement, but the process proved unsuccessful.

THE APPELLANT'S ARGUMENTS

[16] The position taken by the appellant in this appeal was no damages was payable since the cooperation agreement, as indicated in cl 2.1, was merely an agreement to agree. There were thus two stages contemplated by the parties — pre-award and post-award stages. For the pre-award stage, each party was to bear its own cost, whereas for the post-award stage it depended on the further agreement to be entered between the parties, which did not materialise. On the evidence too, the respondent failed to prove the special damages it claimed. PW2 for the respondent in fact admitted in his testimony (during cross-examination) that the respondent did not have any evidence to substantiate its claim for the special damages. (See p 120 of the appeal record, Vol 1 (Parts B and C):

> Q: All the losses in pages 28-31 in C — do you have the evidence?
>
> A: In the file there is no evidence.

[17] From the oral submissions and the written submission of the appellant, it appeared that the appellant took the position that *quantum meruit* was not part of the agreed issues to be tried, no material facts were introduced in evidence to support it, and it was not pleaded, being raised for the first time after the close of the parties' case. *Md Hamid Merican bin Abdul Kader Merican v Abdul Razak bin Hussain & Ors* [2010] 9 MLJ 1 and *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* [2009] 6 MLJ 293 were referred to. A passage in *Pacific Industries*, was particularly emphasised:

> The court decides a case after considering the evidence adduced by each party and the documents produced by them. Neither party should be taken by surprise. Whether at first instance or at appellate level, judges rely heavily on submissions and authorities submitted by counsel. As a matter of professional etiquette, counsel is supposed to bring to the court's attention authorities which may even favour his opponent's case, though he may proceed to distinguish his case from such authorities. It is dangerous and not advisable for the court, on its own accord, to consider a point without reliance on any pleadings or submissions by counsel. If a judge thinks there are any points which are relevant to the case before him and which was not raised by either party, it is his duty to highlight those points to the parties before him. He must then give an opportunity for both parties to further submit on those particular points. Where a judge makes a decision on an issue that is not based on the pleadings and without hearing the parties on that issue, the judge would then be in breach of the legal maxim audi alteram partem.

[18] Citing the observation of the Federal Court in *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188, the appellant reinforced its submission of a major error on the part of the High Court. The Federal Court in that case held:

> … we cannot agree with the rationale of the Court of Appeal on this issue. There is no evidence to support the proposition except an imagination drawn from, if we may say, a desire to play the part of a crusader to fight a cause in which it does not know who the villain is. There is a limit to how far a court should do so in the name of justice …

THE RESPONDENT'S ARGUMENTS

[19] For the respondent, counsel submitted that it was not disputed that work was done by the respondent in securing the award of the project for the appellant. The judicial commissioner had sufficiently explained the reasons why he awarded damages to be assessed based on quantum meriut. It was argued in support of the High Court's decision that quantum meruit did not need to be expressly pleaded when the facts justifying it were 'writ in the whole claim'.In support of the argument, the following authorities were specifically advanced: *KEP Mohamad Ali v KEP Mohamad Ismail* [1981] 2 MLJ 10; *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600.

[20] Further, the Federal Court decision in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; [1982] CLJ (Rep) 190 was cited in support of the learned judicial commissioner's reliance on the omnibus prayer, as earlier referred to herein. Salleh Abbas FCJ commented in the relevant passage of the judgment advanced before us:

> We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in para. (7), 'Any other relief which this Honourable Court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning …

OUR EVALUATION

[21] The case before the High Court involved an odd situation. The High Court had in fact dismissed the claim for special and general damages after a full trial because these claims were not proven. Quantum merit was described as being the lesser of these claims. Logically, if the greater was dismissed, the lesser must by right also fall. Of course, if material facts on a quantum meruit claim had been introduced, established, evaluated and accepted by the court, there could possibly be some room for argument, but this was not the case in

this appeal. The learned judicial commissioner decided on his own accord to order damages to be assessed on the basis of quantum meruit for the sake of justice and fairness. Regrettably, in proceeding to act on his own accord, the learned judicial commissioner had perhaps downplayed another important component of practical justice in hearing cases before the court, and that concerned the maxim 'audi alteram partem'.

[22] To decide on an unpleaded claim is to deny the opposing party the valuable right to answer the claim by adducing such material facts at the trial as it might find necessary to forward to the court to advance its case against the claim. On the facts of this appeal, however, the problem was compounded by the absence of supporting material facts in relation to a quantum meruit claim. This claim was never expressly pleaded and was never part of the agreed facts or agreed issues. It never figured even in the summary of the plaintiff's case, the plaintiff's case was wholly grounded on a claim for special and general damages for breach of the cooperation agreement. To quote the plaintiff in its 'Ringkasan Kes plaintiff':

> 2 Secara umumnya, tuntutan Plaintif terhadap Defendan adalah meliputi gantirugi khas berjumlah RM6,971,246.50, gantirugi am, gantirugi sampingan (consequential), gantirugi kerosakan reputasi, faedah dan kos akibat daripada kemungkiran kontrak/perjanjian oleh Defendan …
>
> 7 Plaintif akan menunjukkan kepada Mahkamah butir-butir kerugian, kehilangan dan jumlah yang terlibat sama ada dalam bentuk khas, am, sampingan dan kerosakan reputasi, yang telah dialami oleh Plaintif sewaktu perbicaraan nanti …

[23] In such a situation, a return to the basic governing principles and rules of pleadings in our system of civil litigation will be timely and appropriate. This was also the route adopted by the learned judicial commissioner, but, with the utmost respect, his conclusions resulted from a misapplication of these basic principles. The law reports are replete with exhortations and reminders by judges on the need for decisions to be grounded on the pleaded case of the litigants, whether plaintiff or defendant. The need to comply with the rules on pleading are generally to be strictly enforced to avoid surprises at the trial and to narrow and define the issues of the parties so that each will know the opposing party's case, to prepare to meet it in advance and to marshal the necessary evidence at trial to establish its claim and answer the defence of the opposing party. The underlying rationale is not only to prevent surprises as seemed to be the reasoning of the High Court, but is much more than just that.

[24] That classic, authoritative text on the rules of pleadings — Sir Jack Jacob & Ian S Goldrein, *Pleadings: Principles and Practice* — provides four 'objects' of pleadings, and it will be worthwhile to quote the relevant passage:

Pleadings — their dual object in summary. Pleadings serve a two-fold purpose:

(a) first To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and

(b) secondly concurrently to appraise the court what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.

The object of pleadings — in detail

(a) first To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court …

(b) secondly To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial …

(c) thirdly To inform the court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made …

… in *Blay v Pollard and Morn's Scrutton* LJ said:

Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitiled to take such a course …

(d) Fourthly To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided thereon so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them … (at pp 3–4 of the text (1990 Ed).

[25] As evident from the passage above, not only are the immediate litigants bound by the rules of pleadings, so is the court.

The Court itself is as much bound by the pleadings of the parties as they are themselves. It is not part of the duty or function of the Court to enter into any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation … (*Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218)

[26] A decision based on an unpleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant

A the right to present his case fully before the judge on the unpleaded issue before the decision is made by the court. A corollary to this principle is the following: it is not the duty of the court to make a case for a party when that party does not raise, or wish to raise, a point in the litigation. *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, states the position very clearly thus:

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> A judgment should be based upon the issues which arise in this suit. If such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure.

C

[27] In our view, a claim for quantum meruit here related to more than a claim based on the legal effects of pleaded material facts; it was a cause of action in itself, which was substantive in nature and therefore required express D pleading and the adduction at trial of a sufficient foundation of facts derived from evidence tendered through witnesses' testimony or relevant, cogent documentary evidence. It was too substantive to be subsumed under the blanket notion of it being based on material facts 'writ large in the whole claim.' By the same token, it was difficult to blandly accept that the 'omnibus' prayer E of 'further or other relief' could supply the omission of an express pleading. Resort to the omnibus prayer would only make sense where the main claim was not dismissed, since after all this was for 'further or other relief'. In our opinion, the decision of the Federal Court in *Lim Eng Kay v Jaafar bin Mohamed Said*, cannot be so liberally read as to countenance a major breach or misapplication F of fundamental rules of pleadings and the proper role of the court in our adversarial system of civil justice.

[28] There was likewise no basis for s 71 to be applied, especially in the face of clear contractual provisions which made the appointment of the respondent G as process designer dependent on further agreement during the post-award stage. Section 71 cannot be interpreted as providing a relief not intended by the parties. To quote this provision for the sake of completeness:

> Where a person lawfully does anything for another person, or delivers anything to H him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[29] As for the argument on implied term, to accept it would mean I conflicting directly with the clear terms of cl 10. As observed earlier, it is no function of the courts to improve the case for the contracting parties. If the result seems unfair to the respondent, the short answer to this shortcoming must be this: It is for a party such as the respondent to ensure by clear contractual provisions that its pre-award expanses and costs should be

reimbursed or shared in whatever proportion it might think fair in the circumstances. It made a commercial decision by choice to agree to cll 10 and 2.1 in the cooperation agreement. It has to stand by it based on the principle of freedom of contract which is a foundation of our contract law.

THE CONCLUSION

[30] For the reasons stated above, we allowed the appeal with costs of RM10,000 to be paid by the respondent to the appellant. The judgment of the High Court was set aside. We further ordered the deposit to be refunded back to appellant.

Appeal allowed with costs of RM10,000.

Reported by Ashok Kumar